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In the
Supreme Court of the United States
October Term, 1971

THOMAS RICCI,

Petitioner,

v.

CHICAGO MERCANTILE EXCHANGE, an Illinois not-for-profit corporation, EVERETTE B. HARRIS, WILLIAM PHELAN, LEO MELAMED, THE SIEGEL TRADING COMPANY, a corporation, and JOSEPH SIEGEL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Ralph E. Brown
104 South Michigan Avenue
Chicago, Illinois 60603
(312) RA 6-4000

Jerome H. Torshen
Lawrence H. Eiger
Harry H. Fortes
Attorneys for Petitioner

Jerome H. Torshen, Ltd.
11 S. LaSalle Street
Chicago, Illinois
Of Counsel

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No.

THOMAS RICCI,

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and JOSEPH SIEGEL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Thomas Ricci, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on June 17, 1971 and the order of said Court denying petitioner's Petition for Rehearing on the Issue of Primary Jurisdiction, dated October 5, 1971.

OPINIONS BELOW

The decision of the United States District Court for the Northern District of Illinois, Civil Action No. 69 C 1030 (1970) (unpublished), the opinion of the Court of Appeals, 414 F.2d 713 (7th Cir., 1971) and the order of the Court of Appeals denying the Petition for Rehearing on the Issue of Primary Jurisdiction (unpublished), appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on June 17, 1971. A timely petition for rehearing was denied on October 5, 1971. This Petition for a writ of Certiorari is filed within 90 days from that latter date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)

QUESTIONS PRESENTED

1. Whether, having found that a complaint properly alleges group boycott, a *per se* violation of Section 1 of the Sherman Act (15 U.S.C. § 1), by a commodities exchange, its officers and a member, the Court of Appeals erred in ordering that the complaint be submitted for decision to the Commodity Exchange Commission and/or the Secretary of Agriculture.

2. Whether, under Section 4 of the Clayton Act (15 U.S.C. § 15), the District Court as the statutory antitrust court has sole jurisdiction over a private antitrust treble damage action involving a commodities market, where the Commodity Exchange Act provides neither an exemption from the antitrust laws nor a remedy for injuries incurred as a result of violations thereof, nor gives standing before any administrative body to the injured plaintiff.

3. Whether there exists a repugnancy between the antitrust laws and the Commodity Exchange Act and the respective objectives thereof which requires the resolution of antitrust questions by an administrative agency empowered to enforce only the statute which created it.

STATUTORY PROVISIONS INVOLVED

Section 4 of the Clayton Act (15 U.S.C. §15) provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

The pertinent provisions of the Commodity Exchange Act (7 U.S.C. §1 et seq.) appear in the Appendix hereto.

STATEMENT

This action was brought by petitioner under Section 4 of the Clayton Act (15 U.S.C. §15) for damages, alleging violation of Section 1 of the Sherman Act and tortious interference with commercial relationships. Named as defendants were the Chicago Mercantile Exchange (hereinafter "the Exchange") three of its officers and one of its members, Joseph Siegel and the Siegel Trading Company.* The Complaint alleges that petitioner had purchased a membership on the Exchange and was qualified to trade in commodities and commodity futures; that the defendants "willfully, knowingly and maliciously confederated, combined and conspired and agreed" to prevent

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* Collectively referred to for convenience as "Siegel."

petitioner from maintaining his membership on the Exchange and transacting business as a broker; that Siegel claimed to be the owner of petitioner's membership but that petitioner informed the Exchange that his indebtedness to Siegel, upon which the latter's claim was based, was more than offset by certain fees owed by Siegel to petitioner; that, thereafter, Siegel induced the defendant officers of the Exchange to breach its rules and, by various means, (including the issuance of an antedated release and the transfer of petitioner's membership to a third party), deprived petitioner of his membership and trading privileges. The effect of the alleged conspiracy was to completely exclude petitioner from trading during the period from February 11, to March 4, 1969. By virtue of the conspiracy, petitioner was seriously disadvantaged *vis a vis* the other members of the Exchange who were his competitors and was thereby injured in his business as a broker.

The District Court dismissed the Complaint for failure to state a cause of action under Section 1 of the Sherman Act.

The Court of Appeals (with all members of the panel in agreement) reversed, holding that:

> "Transfer of his [petitioner's] membership in violation of the rules of the Exchange and pursuant to a conspiracy to intentionally injure his business would constitute a group boycott, *per se* actionable under the Sherman Act."

However, the majority of the Court of Appeals (two judges), ***sua sponte*** in their opinion, ***without the issue of primary jurisdiction having at anytime been raised at any point in the proceedings,*** and over a strong dissent, ordered the cause remanded to the District Court with in-

structions to stay the proceedings pending action thereon "by the Commodities Exchange Commission and/or the Secretary of Agriculture." This petition for writ of certiorari is addressed solely to the issue of primary jurisdiction first raised by the Court of Appeals *subsequent* to oral argument.

REASONS FOR GRANTING THE WRIT

The decision of the court below represents a significant and serious departure from accepted principles of antitrust enforcement and primary jurisdiction in regulated industries. The decision improperly limits the operation of the antitrust laws against restraints of trade, monopolization and similarly unlawful conduct in commodity transactions. The Clayton Act places jurisdiction of antitrust actions exclusively in the United States District Courts, in absence of an express or clearly implied statutory exemption. The Commodity Exchange Act provides no such exemption. By remanding the cause to the Commodity Exchange Commission (hereinafter "CEC") or the Secretary of Agriculture (hereinafter "the Secretary"), neither of whom have any statutory authority or expertise to decide antitrust issues in private treble damage actions, the court below has placed an important area of the national economy (i.e., agricultural commodities) outside the scope of effective antitrust enforcement.

In *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 342 (1963), this Court noted that the question of the application of the antitrust laws to securities exchanges was "of great importance to the public and the financial community." The issue before this Court in the instant cause is of equal importance to the public and to those who produce, sell and buy agricultural commodities.

The importance of the primary jurisdiction issue herein is demonstrated by the fact that there are now pending in various lower courts several antitrust cases involving commodities transactions in which the decision of the court below herein has been or almost surely will be raised by defendants. In *Phillips* v. *Chicago Mercantile Exchange*, No. 70 C 216 (N.D. Ill., 1970), the District Court denied

defendants' motion to stay the proceedings pending referral to the Commodities Exchange Commission but, as a result of the instant case, certified the question pursuant to 28 U.S.C. § 1292b. The Court of Appeals for the Seventh Circuit accepted the certificate. In *Seligson* v. *New York Produce Exchange*, No. 66 Civ. 1016 (S.D. N.Y., 1971), a similar motion was denied by Judge Edward L. Palmeri. There are currently pending similar motions in the United States District Court for the Northern District of Illinois in *Arenson* v. *Chicago Mercantile Exchange* (No. 71 C 854) and *Arenson* v. *Chicago Board of Trade* (No. 71 C 855), antitrust actions involving conspiracies to fix minimum brokerage fees and in *Paynesville Produce Co.* v. *Tyson's Foods, Inc.*, (No. 70 C 2560) * involving a conspiracy to restrict the supply and artificially raise the price of September, 1970 eggs on the Mercantile Exchange. Recently, antitrust actions for conspiracy to fix minimum fees have been filed by the Antitrust Division of the United States Department of Justice. (*United States* v. *Board of Trade of the City of Chicago*, No. 71 C 2875), and by private litigants alleging a conspiracy to restrict the supply and artificially raise the price of May, 1971 Idaho potatoes, *Gneiting* v. *Taggares*, (No. CIV 4 71 31, D. Idaho, 1971) *

In each of the foregoing antitrust actions, the existence of the primary jurisdiction issue raised herein by the Court of Appeals demonstrates the compelling need for the guidance of this Court so that the responsibility for adjudicating antitrust questions in the field of commodities trading will rest where the Congress placed it; within the jurisdiction of the District Courts. Without such guidance

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* The Commodities Exchange is not named as a defendant in the *Paynesville* and *Gneiting* cases.

from this Court, it must be expected that the parties in the foregoing actions, the lower courts and the administrative agencies will needlessly expend vast amounts of time, effort and resources as they dispute which tribunal has jurisdiction over violations of the antitrust laws. Thus, the issue presented by the lower court decision assumes a special significance in antitrust and administrative law of which this Court should take cognizance and give direction.

The court below improperly invoked the doctrine of primary jurisdiction for several reasons:

1. In absence of a specific statutory provision to the contrary, exclusive jurisdiction of antitrust actions rests in the United States District Courts.

2. The conduct herein complained of has been held to be a *per se* violation of Section 1 of the Sherman Act; it is not arguably lawful under any provision of the Commodity Exchange Act. Nor does that act create a pervasive regulatory scheme, the fulfillment of which can be achieved only by excluding the District Court.

3. The Commodity Exchange Act does not authorize either the Secretary or the CEC to provide exemptions from the antitrust laws or to make determinations regarding antitrust questions. Their administrative authority is, by the express provisions of the statute, limited to determinations concerning the Commodity Exchange Act.

4. Neither the CEC nor the Secretary have the power to award petitioner damages. Congress has determined that only the District Court can perform such functions in an antitrust case.

5. There is no necessity for uniformity of policy within the agencies involved with regard to the transactions for which relief is sought.

6. There is no particular agency expertise involved; in fact, neither the CEC nor the Secretary is as well qualified as the federal courts to resolve antitrust issues.

7. Petitioner is without standing to prosecute his claim in any forum but in a court.

I. Neither the Commodity Exchange Commission Nor the Secretary of Agriculture have the Power to Grant Immunity from the Antitrust Laws

This Court has repeatedly held that the antitrust laws represent fundamental economic policy. Repeal of antitrust laws by implication in a regulated industry is not favored. *California* v. *Federal Power Commission*, 369 U.S. 482, 485 (1962); *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 348 (1963); *United States* v. *Borden Co.*, 308 U.S. 188, 201 (1939); *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 217 (1966).

In *Carnation*, this Court stated:

> "We recently said: 'Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions.' *United States* v. *Philadelphia National Bank*, *supra*. *We have long recognized that the antitrust laws represent a fundamental national economic policy and have therefore concluded that we cannot lightly assume that the enactment of a special regulatory scheme for particular aspects of an industry was intended to render the more general provisions of the*

> *antitrust laws wholly inapplicable to that industry.* We have, therefore, declined to construe special industry regulations as an implied repeal of the antitrust laws even when the regulatory statute did not contain an accommodation provision . . ." (383 U.S. at 217-218, emphasis supplied)

The foregoing principle has been ignored by the majority decision of the court below which, without authority in either the language of the Commodity Exchange Act or its objectives, deprives the district court of that function which Congress specifically placed within its province, i.e., the determination of liability and damages in private antitrust actions. The administrative body to which the court below remanded this cause is given authority only to investigate, punish or prevent violations of the Commodity Exchange Act. Nowhere in that Act are either the Secretary or the CEC given authority to consider, investigate, punish, prevent or give damages in situations involving violation of the antitrust laws. Judge Kerner, dissenting in the court below, stated:

> "Congress has strictly limited the jurisdiction of the Secretary of Agriculture and the Commission to violations 'of the provisions of this chapter' (see, e.g. Title 7 U.S.C., §13a). This chapter means the 'Commodity Exchange Act' (Title 7, USC, §1) and not the 'Sherman Act', which is found at 15 USC §1."

Although the Commodity Exchange Act confers neither antitrust powers nor exemptions, Section 4 of the Clayton Act provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor *in any district court of*

> *the United States* . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (Emphasis supplied)

The absence of any express repugnancy between the antitrust and commodities laws is similarly reflected, as we show below, in the objectives and structure of the scheme established by Congress to regulate commodities trading.

II. The Regulatory Scheme of the Commodity Exchange Act is Not so Pervasive as to Encompass or Exclude Antitrust Enforcement by the District Court

The Commodity Exchange Act assigns to the Secretary the authority to license and regulate commodity exchanges and trading thereon. The limited regulatory scheme thus established is not so pervasive as to exclude or supplant competitive principles protected by the antitrust laws. Nor does the scheme of regulation provide any mechanism which, as in rate making or route assignments in transportation, substitutes agency action for competition. This lack of pervasive regulation bars the application of the doctrine of primary jurisdiction in the instant case. *California* v. *Federal Power Commission*, 369 U.S. 482 (1962); *Maryland and Virginia Milk Producers Ass'n.* v. *United States*, 362 U.S. 458 (1960); *United States* v. *Radio Corporation of America*, 358 U.S. 334, 350 (1959); See also, *United States* v. *Borden Co.*, 308 U.S. 188, 199-204 (1939); *Denver Union Stock Yards Co.* v. *Denver Live Stock Commission Co.*, 404 F.2d 1055, 1059 (10th Cir., 1968); *cert denied*, 394 U.S. 1014 (1969); *McKeon Construction Co.* v. *McClatchy Newspapers*, 1970 C.C.H. Trade Cases ¶¶73, 212 (N.D. Cal., 1969). The regulatory scheme relied upon by the court below is far less pervasive than those consid-

ered in the foregoing cases wherein this Court held that the doctrine of primary jurisdiction could not be invoked for the lack of such pervasiveness.

In *United States* v. *Radio Corporation of America*, 358 U.S. 334 (1959), the complaint alleged that RCA and its wholly owned subsidiary, NBC, were engaged in a continuing conspiracy in violation of Section 1 of the Sherman Act the object of which was to acquire stations in five of the eight largest market areas in the country, and that in furtherance thereof, NBC had utilized the leverage of network affiliation to force Westinghouse Broadcasting Co. to exchange its Philadelphia station for NBC's station in Cleveland. The defendants asserted an affirmative defense based upon the Federal Communications Commission's approval of the exchange. This Court found, however, that Congress had not empowered the FCC to decide antitrust questions nor was the agency's action intended by Congress as a bar against antitrust enforcement by the federal courts in the television broadcast industry. This Court compared the power of the FCC with that of the Interstate Commerce Commission in the regulation of common carriers, and stated:

> "There carriers could charge only the published tariff, and that that tariff must have been found by the appropriate agency to have been reasonable. *Free rate competition was modified by federal controls.* The court's concern was that the agency which was expert in, and responsible for, administering those controls should be given the opportunity to determine questions within its special competence as an aid to the courts in resolving federal antitrust policy and federal regulatory patterns into a cohesive hold. *That some resolution is necessary when the antitrust policy of free com-*

petition is placed beside a regulatory scheme involving fixed rates is obvious." (358 U.S. at 348, emphasis supplied)

This Court observed that television is also a regulated industry, but ". . . it is regulated in a very different way. That way is controlling," and that while regulation replaced free competition in the case of common carriers, "the field of broadcasting is one of free competition." This Court then concluded:

> "'The sections dealing with broadcasting demonstrate that *Congress has not, in its regulatory scheme, abandoned the principle of free competition* as it is done in the case of railroads . . .' Thus, there being no pervasive regulatory scheme, and no rate structures to throw out of balance, sporadic action by federal courts can work no mischief. The justification for primary jurisdiction accordingly disappears." (358 U.S. at 349, emphasis supplied)

Likewise, there is nothing in the Commodity Exchange Act which indicates that Congress intended regulation to insulate group boycotts from the antitrust laws. The defendants' private decisions, unapproved by the administrative agency, excluded petitioner from the market place. Petitioner's exclusion was accomplished by a conventional business conspiracy which, among other things, may have violated the rules of the Exchange. Whether this fact would justify the Secretary in punishing the perpetrators of the wrong by excluding them from trading is irrelevant to antitrust considerations. Whether the Secretary wishes to exercise his discretion not to report a group boycott for prosecution because he considers it a "minor violation" of the Commodity Exchange Act is similarly irrelevant. These are *ad hoc* determinations of administrative officers, not vital components of a pervasive regulatory

system. On the other hand, consideration of antitrust issues in this case by the district court will not throw administratively established rate structures out of balance or disrupt a regulatory program which has replaced competition in the interest of the public. Simply stated, this case involves a statutory wrong done an individual which is not justified, immunized or excused by any pervasive regulatory scheme. Hence, as this Court noted in *RCA*, "action by federal courts can work no mischief. The justification for primary jurisdiction accordingly disappears." (358 U.S. at p. 350)

In the instant case, enforcement of the antitrust laws is entrusted neither to the CEC nor the Secretary. While the Secretary may punish the defendants or refuse to report the boycott as a "minor violation" of the Commodity Exchange Act he is not authorized to immunize the participants in a boycott from liability under the Sherman Act.

The decision of the court below is inconsistent with the decisions involving stockyards, which, like commodities exchanges, provide unique centralized facilities for agricultural transactions. Individuals in the industry are dependent upon them for the conduct of their business. Like exchanges, stockyards are partially regulated by the Secretary of Agriculture.* But it has been held that the regulation is not pervasive, and the antitrust laws may be applied to conduct outside the particular province of the administrator. *Denver Union Stockyards Co.* v. *Denver Livestock Commission Co.*, 404 F.2d 1055 (10th Cir., 1968); *Crain* v. *Blue Grass Stockyards Co.*, 399 F.2d 868 (6th Cir., 1968). In *Denver Union*, a livestock market agency brought a private antitrust action against the owner of a stockyard

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* Under the Packers and Stockyards Act of 1921, 7 U.S.C. § 181 et. seq.

charging monopolization of the business in Denver, Colorado. The Court of Appeals stated:

> "The Secretary is given no power over acquisitions and mergers. Those regulated may abandon their activities without agency approval. In our opinion, the act is not of the pervasive character which, when found in other acts, has resulted in the invocation of the primary jurisdiction doctrine. The determination of whether the charged antitrust violations have occurred does not require administrative expertise and court action will not impair or interfere with the coherence or uniformity of an intricate administrative program.
>
> "We believe that the pleadings present antitrust issues which call for judicial action." (404 F.2d at 1059)

In this case, the Secretary is given no power over group boycotts and similar restraints of trade. The defendants acted in an area outside the scope of administrative regulation and should be subject to judicial action.

III. The Administrative Agency is Without Power to Grant Relief to Petititioner

Even if the CEC or the Secretary were authorized to make antitrust determinations, they are clearly without power to award damages as provided for in Section 4 of the Clayton Act. Petitioner cannot even prosecute his own claim before the agency. He may ask leave to intervene in agency proceedings but the agency may exclude him if it so desires. Reference to such an impotent body serves only to frustrate or delay petitioner's right to his day in court. *Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.*, 393 F.2d 441 (2d Cir., 1968), *cert. denied*, 393 U.S. 846 (1968); *Trans World Airlines* v. *Hughes*, 214 F.Supp. 106 (S.D.N.Y., 1963), *aff'd.*, 332 F.2d 602 (2d Cir., 1964); *Breen Air Freight, Ltd.* v. *Air Cargo, Inc., et al.*,

1971 CCH Trade Cas. ¶73,775 (S.D.N.Y., 1971). See also *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963); *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 222 (1966).

In *Trans World Airlines* v. *Hughes*, the district court held that, although the acquisition of an airline by an aircraft supplier had been approved by the Civil Aeronautics Board, the supplier was not thereby immunized from a suit for treble damages charging the supplier with monopolizing the sale and lease of aircraft and conspiring to finance only purchases of its aircraft by the acquired airline. The court stated:

> "Furthermore, the Board has no power to award damages, and we do not reach the statement of the Court in Panagra [Pan American World Airways, Inc. v. United States, 371 U.S. 296 (1963)] to the effect that since the Board's essential regulatory powers deal with division of territories, etc., then Congress must have intended to give it authority that was ample to deal with evil at hand. *Rather, the statement by the Court that a court has jurisdiction under the antitrust laws if the agency has no power to grant relief is controlling here.*" (214 F.Supp. at 111-112, emphasis supplied)

On appeal, the Court of Appeals for the Second Circuit (332 F.2d 602) stated, in affirming, that in the absence of explicit Congressional mandate relegating the alleged unlawful transactions to the CAB, there was no basis for declaring federal courts to be without jurisdiction. Moreover, there was no necessity for a uniformity of policy with respect to these transactions nor was the Board more qualified to consider such charges than the federal courts, ". . . which daily encounter and resolve antitrust problems."

IV. The Action of the District Court in a Treble Damage Case Will Not Impinge on the Administration of the Commodity Exchange Act.

In the case at bar the statutes do not entrust antitrust questions to the CEC or the Secretary. Nor will the action of the district court impinge upon the agency's regulatory obligations. The court below did not and indeed could not find that the conduct in question was arguably lawful even under the regulatory scheme. In absence of any regulatory justification for the defendants' conduct, the doctrine of primary jurisdiction is inapplicable. *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213, 221-222 (1966); *Allied Air Freight, Inc.* v. *Pan American World Airways,* 393 F.2d 441 (2d Cir., 1968), *cert. denied,* 393 U.S. 846 (1968); *Marnell* v. *United Parcel Service of America, Inc.,* 260 F. Supp. 391 (N.D. Calif., 1966); *Breen Air Freight, Ltd.* v. *Air Cargo, Inc.,* 1971 CCH Trade Cas. ¶73, 775 (S.D.N.Y., 1971).

In *Carnation,* a shipper sought treble damages against certain conferences of shipping companies on grounds that they had violated the antitrust laws in maintaining shipping rate increases for evaporated milk pursuant to rate making agreements which had not been approved by the Federal Maritime Commission. This Court distinguished its decisions in *Far East Conference* v. *United States,* 342 U.S. 570 (1952) and *United States Navigation Co.* v. *Cunard S.S. Co.,* 284 U.S. 474 (1932), cited by the majority of the court below herein. In those cases, plaintiffs sought to *enjoin* implementation of unapproved agreements, thereby creating the possibility of a conflict between the courts and the Federal Maritime Commission. However, the Court stated:

> "The award of treble damages for *past and completed conduct which clearly violated the Shipping Act would certainly not interfere with any future action of the Commission.* Although the Commission can approve prospective operations under agreements which have been implemented without approval, respondents concede that the Commission has no power to validate pre-approval implementation of such agreemnts. Therefore, the *Far East* and *Cunard* principles only preclude courts from awarding treble damages when the defendants' conduct is arguably lawful under the Shipping Act." (383 U.S. at 222, emphasis supplied)

In the instant case, a group boycott is not arguably lawful under the Commodity Exchange Act. Thus, reference to an administrative agency is unnecessary and, since it frustrates petitioner's right to seek redress under the antitrust laws, improper. Petitioner is not seeking a determination as to whether the rules of the Exchange which defendants violated in the course of the conspiracy were reasonable within the purview of the Commodity Exchange Act. The issue raised by the Complaint is simply whether defendants conspired to exclude petitioner from trading. That defendants might also have violated Exchange rules in so doing cannot thereby immunize them from the operation of the antitrust laws. It requires no particular administrative expertise to determine whether the defendants so conspired or whether, in the course of so doing, they violated Exchange rules. *Crain* v. *Blue Grass Stockyards Co.*, 399 F.2d 868, 872 (6th Cir., 1968); *Breen Air Freight, Ltd.* v. *Air Cargo, Inc.*, 1971 CCH Trade Cas. ¶73,775 (S.D.N.Y., 1971). In a recent opinion, the district court in *Breen Air Freight, Ltd.* followed this Court's reasoning in *Carnation*. The court stated:

> "The issue is not the interpretation of an unapproved agreement or whether the order [approving the establishment of Air Cargo] itself is reasonable, but whether the order has been violated. The courts are competent to make such an interpretation."

In the instant case, the court below recognized that the defendants' conduct was without "debatable legality" under the regulatory legislation. See *Marnell* v. *United Parcel Service,* 260 F.Supp. 391 (N.D. Cal. 1966) at p. 412. The majority appears concerned only that the CEC or the Secretary might consider defendants' actions to be "minor violations" and that an award of treble damages, which the court below considered to be "essentially punitive in nature," would conflict with an agency decision that punitive action allowable under the Commodity Exchange Act should not be taken. So narrow a consideration disregards this Court's repeated recognition of the high public purpose of private treble damage actions. This Court, in *Fortner Enterprises, Inc.* v. *United States Steel Corp.,* 394 U.S. 495, 502 (1969) stated:

> "As the special provision awarding treble damages to successful plaintiffs illustrates, Congress has encouraged private antitrust litigation not merely to compensate those who have been directly injured but also to vindicate the important public interest in free competition."

Congress has stated that it is in the public interest for an individual to enforce the policy underlying the antitrust laws by seeking redress for injuries caused by violations of those laws. This is precisely what petitioner sought to do in this case. Contrary to the Congressional purpose, the majority in the court below has now assigned to an administrative agency the right to determine whether

defendants' past conduct is a "minor violation" of the Commodity Exchange Act or of the Exchange rules. The conduct in question had a substantial effect on the business of the petitioner and, regardless of the Secretary of Agriculture's feeling in the matter, the Congress has given to petitioner an action by which he may vindicate his rights.

None of the tests which have heretofore permitted a court to refer a matter to an administrative agency under the doctrine of primary jurisdiction are applicable in the instant case. There is no question of accommodation between the courts or the agencies. Resort to the agency will serve no purpose other than to delay petitioner's claim and to cause him additional expense in an attempt to vindicate the wrong done him. The late Mr. Justice Frankfurter, dissenting in *Meat Cutters Union* v. *Jewel Tea Co.*, 381 U.S. 676, 686 (1965), stated:

> ". . . The doctrine of primary jurisdiction is not a doctrine of futility; it does not require resort to 'an expensive and merely delaying administrative proceeding when the case must eventually be decided on a controlling legal issue wholly unrelated to determinations for the ascertainment of which the proceeding was sent to the agency.'"

In the instant case, the administrative agency has no special competence. Hence, deference to the administrator is beyond the needs of the administrative process and can only be time-consuming, expensive and wasteful.

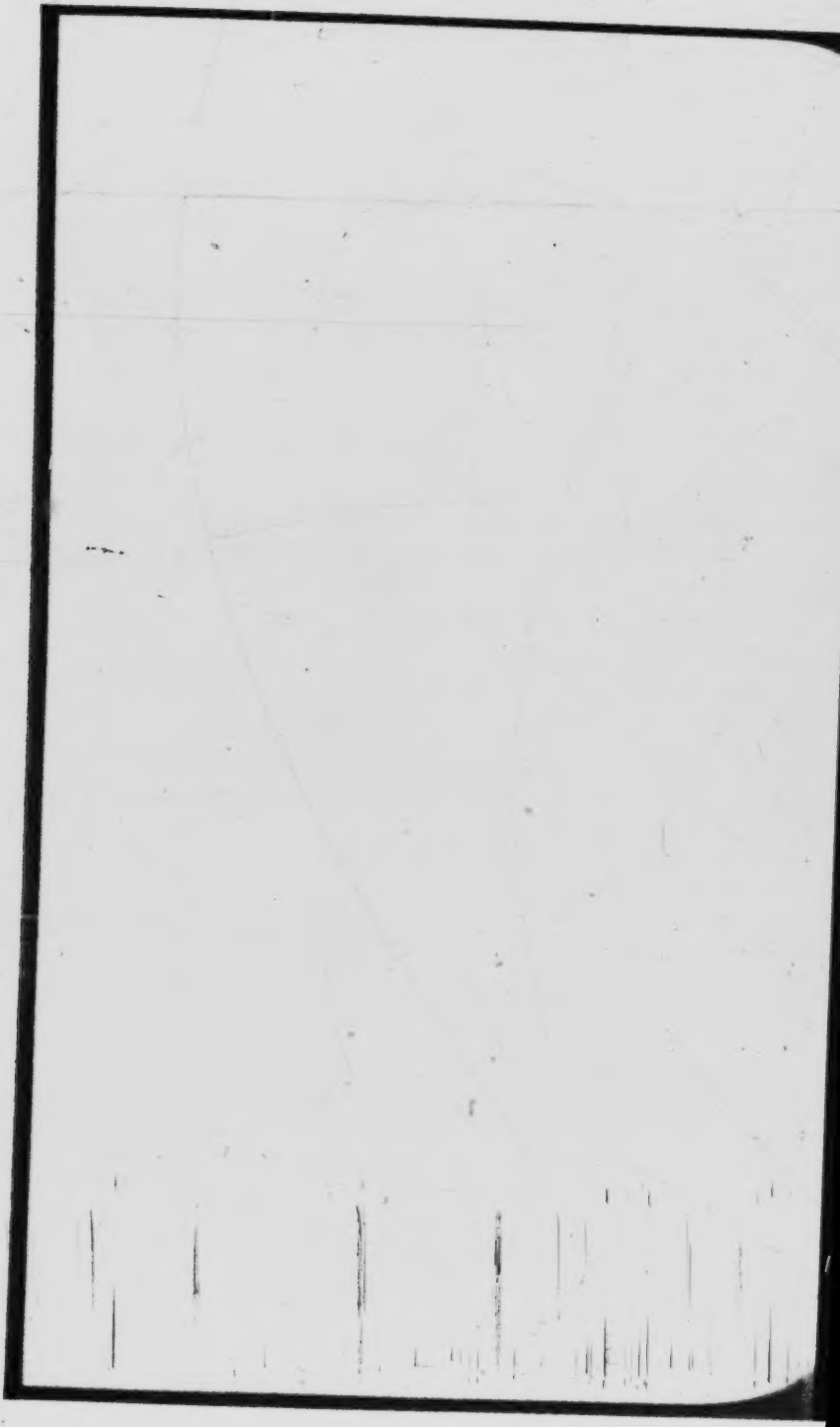
CONCLUSION

By virtue of the foregoing, petitioner respectfully prays that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

RALPH E. BROWN
111 W. Washington Street
Chicago, Illinois 60603

JEROME H. TORSHEN
LAWRENCE H. EIGER
HARRY H. FORTES
11 S. LaSalle Street
Chicago, Illinois 60603
Counsel for Petitioner



APPENDIX

The Commodity Exchange Act (7 USC §7 et seq.) provides in pertinent part:

"§7. Designation of board of trade as "contract market"; conditions and requirements

The Secretary of Agriculture is hereby authorized and directed to designate any board of trade as a "contract market" when, and only when, such board of trade complies with and carries out the following conditions and requirements:

* * *

"§7a. Duties of Contract Markets

Each contract market shall— . . .

(8) enforce all by-laws, rules, regulations, and resolutions, made or issued by it or by the governing board thereof or any committee, which relate * * * to other trading requirements, and which have not been disapproved by the Secretary of Agriculture . . ."

* * *

(9) enforce all by-laws, rules, regulations, and resolutions, made or issued by it or by the governing board thereof or by any committee, which provide minimum financial standards and related reporting requirements for . . . members of such contract markets. . . ."

* * *

"§7b. Suspension or revocation of designation as 'contract market'

The failure or refusal of any board of trade to comply with any of the provisions of this chapter, or any of the rules, regulations or orders of the Secretary of Agriculture or the commission thereunder, shall be cause for suspending for a period not to exceed six

months or revoking the designation of such board of trade as a 'contract market' in accordance with the procedure and subject to the judicial review provided in Section 8 of this title."

• • •

"§8. Application for designation as "contract market"; suspension or revocation of designation; composition of commission; review by court of appeals

Any board of trade desiring to be designated a "contract market" shall make application to the Secretary of Agriculture for such designation and accompany the same with a showing that it complies with the conditions of section 7 of this title, and with a sufficient assurance that it will continue to comply with the requirements of such section 7.

A commission composed of the Secretary of Agriculture, the Secretary of Commerce, and the Attorney General is authorized to suspend for a period not to exceed six months or to revoke the designation of any board of trade as a "contract market" upon a showing that such board of trade has failed or is failing to comply with any of the requirements of section 7 of this title or is not enforcing its rules of government made a condition of its designation as set forth in section 7 of this title. . . .

• • •

§13a. Non-enforcement of Rules of Government or other Violations, Cease and Desist Orders against contract markets; punishment; misdemeanor; separate offenses

If any contract market is not enforcing or has not enforced its rules of government made a condition of its designation as set forth in Section 7 of this title, or if any contract market, or any director, officer, agent, or employee of any contract market otherwise is violating or has violated any of the provisions of

this chapter or any of the rules, regulations, or orders of the Secretary of Agriculture or the commission thereunder, the commission may, upon notice and hearing and subject to appeal as in other cases provided in paragraph (a) of Section 8 of this title, make and enter an order directing that such contract market, director, officer, agent or employee shall cease and desist from such violation and if such . . . shall fail or refuse to obey or comply with such order, such contract market, director, officer, agent or employee shall be guilty of a misdemeanor and, upon conviction thereof shall be fined not less than $500 nor more than $10,000 or imprisoned for not less than six months or more than one year, or both. . .."

§13c. Responsibility as principal; minor violations

(a) Any person who commits, or who willfully aids, abets, counsels, commands, induces, or procures the commission of, a violation of any of the provisions of this chapter, or any of the rules, regulations, or orders issued pursuant to this chapter, or who acts in combination or concert with any other person in any such violation, or who willfully causes an act to be done or omitted which if directly performed or omitted by him or another would be a violation of the provisions of this chapter or any of such rules, regulation, or orders may be held responsible in administrative proceedings under this chapter for such violation as a principal.

(b) Nothing in this chapter shall be construed as requiring the Secretary of Agriculture or the commission to report minor violations of this chapter for prosecution, whenever it appears that the public interest does not require such action.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Name of Presiding Judge, Honorable James B. Parsons

Cause No. 69C1030 Nov. 25, 1969

Thomas Ricci v. Chicago Mercantile Exch. etal

Ruling on deft's motion to present Memo., Opinion and plaintiff's objcs. thereto.

Motion of defendants to dismiss the complaint, is allowed, and it is so ordered.

/s/ Parsons, J

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1970 — JANUARY SESSION, 1971

No. 18222

THOMAS RICCI,

Plaintiff-Appellant,

v.

CHICAGO MERCANTILE EXCHANGE, an Illinois not-for-profit corporation, EVERETTE B. HARRIS, WILLIAM PHELAN, LEO MELAMED, THE SIEGEL TRADING COMPANY, a corporation, and JOSEPH E. SIEGEL,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JUNE 17, 1971

Before HASTINGS, *Senior Circuit Judge*, and KILEY and KERNER, *Circuit Judges*.

HASTINGS, *Senior Circuit Judge*. Plaintiff Ricci brought this action under sections 4 and 16 of the Clayton Act,

Title 15, U.S.C.A. §§ 15[1] and 26,[2] seeking injunctive relief and treble damages. The complaint charged defendants Chicago Mercantile Exchange, its president, Everette B. Harris, its vice-president, William Phelan, its board chairman, Leo Melamed, and Siegel Trading Company and its president, Joseph Siegel with violations of section 1 of the Sherman Act, Title 15, U.S.C.A. § 1[3] and tortious interference with commercial relationships. Siegel Trading Company and Siegel[4] moved to dismiss the complaint for failure to state a claim upon which relief could be granted and for want of jurisdiction. In a separate motion to

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[1] Title 15, U.S.C.A. § 15 provides:

"§ 15. Suits by persons injured; amount of recovery

"Any person who shall be injured in his business or property my reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

[2] Title 15, U.S.C.A. § 26 provides, *inter alia:*

"§ 26. Injunctive relief for private parties; exception

"Any person * * * shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws * * *."

[3] Title 15, U.S.C.A. § 1 provides, *inter alia:*

"§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States * * * is declared to be illegal * * *."

[4] Siegel Trading Company will be referred to as "Siegel." Likewise, the Chicago Mercantile Exchange and its officers will be referred to as the "Exchange" or the "Exchange defendants."

dismiss, the Exchange defendants argued the complaint failed to state a cause of action under section 1 of the Sherman Act. From an order granting defendants' motions to dismiss, plaintiff appeals.

Count I of appellant's six-count complaint alleged, in substance, that he purchased a membership in the Chicago Mercantile Exchange and became duly qualified to trade in commodities and commodity futures pursuant to the rules of the Exchange and the Commodities Exchange Authority. On February 11, 1969, Siegel induced the Exchange and its officers to transfer appellant's membership to James F. Reich, without hearing or notice, utilizing a previously revoked blank authorization to transfer membership. Such action was allegedly in violation of the rules and regulations of the Exchange and the Commodity Exchange Act and was done in pursuance of an unlawful conspiracy with the intent and for the purpose of restraining appellant from conducting his lawful business.[5] As a result of such transfer, appellant was excluded from trading on the Exchange from February 11, 1969 until March 4, 1969 when he purchased another membership for $45,000.

Counts III and V of the complaint are directed against the Exchange and the individual defendants and reallege the allegations of Count I with respect to violation of the Sherman Act. Counts II, IV and VI charge tortious interference with advantageous commercial relationships and, since all parties are residents of Illinois, will necessarily fall for want of jurisdiction if the Sherman Act allegations are not sustained.

The Exchange defendants claim that the trial court, in ruling on the motions to dismiss, admitted evidence

[5] Plaintiff also alleges that the conspirators attempted to induce a "Clearing Member" of the Exchange to issue an antedated release of its authorization of Ricci to trade to Siegel and that the Exchange knowingly failed to enforce its own rules relating to financial reporting. No specific damage is assigned to these allegations.

other than that stated in the complaint and thereby converted them into motions for summary judgment. See, Fed. R.Civ. P. 12(b), 56. If this were true, it would allow this court to examine deposition testimony which appellees contend entirely disposes of the case. The short answer is that the transcript of the hearing on the motion to take depositions demonstrates that the court below was considering only the allegations in the complaint when it ruled on the motions to dismiss.

Since this is an appeal from an order granting Rule 12(b), Fed. R.Civ. P., motions to dismiss, we must accept appellant's foregoing allegations of fact as true. *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172, 174-75 (1965); *Duzynski* v. *Nosal*, 7 Cir., 324 F. 2d 924 (1963).

I

Appellant first contends that, absent any justification to be derived from the Chicago Mercantile Exchange's status as a board of trade and a designated "contract market" under the Commodities Exchange Act, Title 7, U.S.C.A. § 1 *et seq.*, the allegations of the complaint are sufficient to allege a group boycott, a *per se* violation of section 1 of the Sherman Act.

Relying on *Scanlon* v. *Anheuser Busch, Inc.*, 9 Cir., 388 F. 2d 918 (1968), cert. denied, 391 U.S. 916 (1968) and *Ace Beer Distributors, Inc.* v. *Kohn, Inc.*, 6 Cir., 318 F. 2d 283 (1963), cert. denied, 375 U.S. 922 (1963), the Siegel defendants argue that the facts allegedly merely amount to the substitution of one competitor for another with no resulting public injury and are, therefore, not within the purview of the antitrust acts.

Scanlon, supra, and *Ace Beer, supra,* are inapplicable to the case at bar. Each concerned the cancellation of individual exclusive beer distributing contracts with the immediate substitution of other distributors. The relevant markets were competitive and the courts held that no unreasonable restraint of trade resulted from the refusals

to deal since existing competition was not diminished and the cancellation was not an unusual business procedure. See, *Ace Beer, supra* at 287.

Appellant has alleged his exclusion from the Chicago Mercantile Exchange, a monopolistic market, was in violation of its own rules and regulations. Such exclusion is alleged to be a part of a conspiracy to intentionally injure his business. In *Gamco, Inc.* v. *Providence Fruit & Produce Bldg.*, 1 Cir., 194 F. 2d 484 (1952), cert. denied, 344 U.S. 817 (1952), the court was confronted with the exclusion of a trader from a produce building where the sales of fresh fruits and vegetables occurred. The board that managed the building refused to renew the trader's lease after its expiration. The court in finding violations of sections 1 and 2 of the Sherman Act said:

> "[T]he latent monopolist must justify the exclusion of a competitor from a market which he controls. Where, as here, a business group understandably susceptible to the temptations of exploiting its natural advantage against competitors prohibits one previously acceptable from hawking his wares beside them any longer at the very moment of his affiliation with a potentially lower priced outsider, they may be called upon for a necessary explanation. The conjunction of power and motive to exclude with an exclusion not immediately and patently justified by reasonable business requirements establishes a prima facie case of the purpose to monopolize." *Id.* at 488.

Accepting, as we must, appellant's allegations as to the reasons and manner in which he was excluded, there is no justification for the actions of the Exchange and the individual defendants. The transfer of his membership in violation of the rules of the Exchange and pursuant to a conspiracy to intentionally injure his business would constitute a group boycott, *per se* actionable under the Sherman Act.

The absence of an allegation of public injury is not fatal to the maintenance of an action where a *per se* violation is alleged. *Radiant Burners, Inc.* v. *Peoples Gas, Light and Coke Co.*, 364 U.S. 656 (1961); *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Switzer Brothers* v. *Locklin*, 7 Cir., 297 F. 2d 39 (1961).

Likewise, where the defendants enjoy the power to deny potential competitors access to the market, the absence of competitive change in the relevant market is not fatal to the cause of action. *Gamco, Inc., supra* at 487.

Finally, this is not a case, as appellees contend, where appellant has used traditional antitrust language to transform an essentially state cause of action into a federal antitrust claim. *Compare, Norville* v. *Globe Oil & Refining Co.*, 7 Cir., 303 F. 2d 281 (1962); *Parmelee Transportation Company* v. *Keeshin*, 7 Cir., 292 F. 2d 794 (1961).

In view of the foregoing, we conclude that, absent any justification from the Exchange's status as a board of trade and a designated "contract market," the complaint is sufficient to allege a group boycott, a *per se* violation of section 1 of the Sherman Act.

II

Relying primarily on *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963), appellant asserts that no justification can be derived either from the Commodities Exchange Act or from the Exchange's status as a board of trade for the actions herein alleged. Consequently, he claims a cause of action under section 1 of the Sherman Act has been stated.

In *Silver, supra*, member firms of the New York Stock Exchange were ordered by the Exchange to terminate private telephone and tickertape connections to Silver's over-the-counter brokerage firms. The Court, observing that the concerted cut-off by the Exchange and its members had

deprived Silver of an asset important to his ability to compete as a broker-dealer, said that such conduct would have been a *per se* violation of the Sherman Act "absent any justification derived from the policy of another statute or otherwise." *Id.* at 348-49. However, because of the existence of the mandate of self-regulation present in the Securities Exchange Act, the Court sought to "reconcile pursuit of the antitrust aim of eliminating restraints on competition with the effective operation of a public policy contemplating that securities exchanges will engage in self-regulation which may well have anticompetitive effects in general and in specific applications." *Id.* at 349.

The Court concluded that under the circumstances of the case, it did not have to complete the accommodation between the acts since the Exchange did not reach the threshold of justification under the statute and had plainly exceeded the scope of its authority to engage in self-regulation by not informing Silver of the charges underlying the decision to terminate the connections and by not providing an appropriate opportunity to explain or refute such charges despite prompt and repeated requests therefor. *Id.* at 361, 365.

Appellant here contends that the Exchange was not justified in excluding him from trading because nothing in the statutory scheme allows the Exchange to discipline brokers by excluding them from trading. Even if there were such statutory authorization, here he was afforded neither hearing nor notice and, thus, he claims the Exchange did not reach the threshold of justification. Assuming these contentions to be true, they do not dispose of this case.

The Chicago Mercantile Exchange is a "contract market" designated by the Secretary of Agriculture to conduct future trading in commodities pursuant to the Commodity Exchange Act, as amended, Title 7, U.S.C.A. § 1, *et seq.* As a condition of such designation, it must fulfill certain statutory requirements including the enactment and enforcement of bylaws, rules and regulations which relate to

"trading requirements"[6] and which provide "minimum financial standards and related reporting requirements"[7] for members of such markets.

Failure to enforce these bylaws, rules and regulations may result in suspension or revocation of the contract market designation[8] as well as cease and desist proceedings with attendant misdemeanor penalties for failure to com-

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[6] Title 7, U.S.C.A. § 7a provides, *inter alia:*

"§ 7a. Duties of contract markets

Each contract market shall—

* * *

"(8) enforce all bylaws, rules, regulations, and resolutions, made or issued by it or by the governing board thereof or any committee, which relate * * * to other trading requirements, and which have not been disapproved by the Secretary of Agriculture * * *."

[7] Title 7, U.S.C.A. § 7a provides, *inter alia:*

"§ 7a. Duties of contract markets

Each contract market shall—

* * *

"(9) enforce all bylaws, rules, regulations, and resolutions made or issued by it or by the governing board thereof or by any committee, which provide minimum financial standards and related reporting requirements for * * * members of such contract market * * *."

[8] Title 7, U.S.C.A. § 7b provides:

"§ 7b. Suspension or revocation of designation as 'contract market'

"The failure or refusal of any board of trade to comply with any of the provisions of this chapter, or any of the rules, regulations, or orders of the Secretary of Agriculture or the commission thereunder, shall be cause for suspending for a period not to exceed six months or revoking the designation of such board of trade as a 'contract market' in accordance with the procedure and subject to the judicial review provided in section 8 of this title."

ply.[9] Anyone who acts singly or in concert with another to bring about a violation of rules and regulations issued pursuant to the Act is liable as a principal for such violations and may be subjected to loss of trading privileges on contract markets, as well as cease and desist proceedings with attendant penalties.[10]

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[9] Title 7, U.S.C.A. § 13a provides, *inter alia:*

"§ 13a. Nonenforcement of rules of government or other violations, cease and desist orders against contract markets; punishment; misdemeanor; separate offenses

"If any contract market is not enforcing or has not enforced its rules of government made a condition of its designation as set forth in section 7 of this title, or if any contract market, or any director, officer, agent, or employee of any contract market otherwise is violating or has violated any of the provisions of this chapter • • • the commission may, upon notice and hearing and subject to appeal as in other cases provided for in paragraph (a) of section 8 of this title, make and enter an order directing that such contract market, director, officer, agent, or employee shall cease and desist from such violation, [and upon failure or refusal to comply] shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $500 nor more than $10,000 or imprisoned for not less than six months nor more than one year, or both. • • •"

[10] Title 7, U.S.C.A. § 13c(a) provides:

"§ 13c. Responsibility as principal; • • •

"(a) Any person who commits, or who willfully aids, abets, counsels, commands, induces, or procures the commission of, a violation of any of the provisions of this chapter, • • • or who acts in combination or concert with any other person in any such violation, or who willfully causes an act to be done or omitted which if directly performed or omitted by him or another would be a violation of this chapter • • • may be held responsible in administrative proceedings under this chapter for such violation as a principal."

The facts alleged by appellant to support his antitrust charge are either violations or induced violations of Exchange rules, promulgated pursuant to the Act, which relate to "trading requirements" and financial reporting requirements.[11] As such, they could have been examined by the Commodity Exchange Commission or the Secretary of Agriculture.[12]

Thus, we are *not* confronted with the problem in *Silver* wherein there was "nothing built into the regulatory scheme which performs the antitrust function of insuring that an exchange will not in some cases apply its rules so as to do injury to competition which cannot be justified as furthering legitimate self-regulative ends." *Id.* at 358. Rather, the maintenance of a private treble-damage suit in the instant case presents the "problem of conflict or co-extensiveness of coverage with the agency's regulatory power" not considered in *Silver*. *Id.* at 358.

Chief Judge Swygert, in his concurring opinion to *Thill Securities Corp.* v. *New York Stock Exchange*, 7 Cir., 433 F. 2d 264 (1970), cert. denied, 39 U.S.L.W. 3424 (U.S. Mar. 30, 1971), suggested that the district court, on remand, consider this problem of coextensiveness of coverage by determining whether the Securities Exchange Commission

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[11] Membership in a contract market is a prerequisite to lawful trading in commodities futures. Title 7, U.S.C.A. § 6. Therefore, Rule 307, allegedly violated in the transfer of appellant's membership, and Rule 322, allegedly violated in the attempt to cancel appellant's authorization to trade, both relate to "trading requirements." The other alleged violation was the failure to enforce financial reporting rules.

[12] The Commission has jurisdiction over alleged violations by the Exchange and its officers. It is composed of the Secretary of Agriculture, the Secretary of Commerce and the Attorney General on their respective designees. The Secretary of Agriculture may decide to exclude members of contract markets from trading.

possessed primary jurisdiction to judge the New York Stock Exchange's allegedly anticompetitive antirebate rule. *Id.* at 276. The resolution of this issue depended, in part, on the consideration of the following factors: (1) the SEC's power to weigh antitrust policy in fulfilling its duty of review of Exchange self-regulation; (2) the ability of an aggrieved party to initiate SEC review; (3) the extent that SEC expertise would be useful in resolving the question of whether the antirebate rule was necessary to make the Securities Exchange Act work; and (4) the possibility of achieving the aims of the Sherman Act without subjecting exchanges to treble damage suits. *Id.* at 277.

Applying these criteria to the instant case, we think it appropriate for the invocation of the doctrine of primary jurisdiction. There exists no express or implied exemption in the Commodity Exchange Act that would prevent the Secretary of Agriculture or the Commodity Exchange Commission from taking into account antitrust principles in their deliberations pursuant to the Act. Judge Leventhal, concurring in *Cities of Statesville* v. *AEC*, D.C. Cir., ... F. 2d ....., (Slip opinion No. 21,706, Dec. 5, 1969) (*en banc*), observed:

> "It is a fair synthesis of the cases [of the Supreme Court and of the D.C. Circuit over the last 25 years] that a statute providing for licensing or other regulation is presumed to permit consideration of antitrust principles, with the harmonizing approach [applied to conflicts between antitrust policies and the agency's other regulatory objectives] • • • unless a contrary intent appears expressly or by necessary implication." (Quotation appears in *Hale* v. *F.C.C.*, D.C. Cir., 425 F. 2d 556, 561 (1970) (concurring opinion)).

Appellant could have applied for the institution of proceedings against the defendants before the Commission and/or the Secretary of Agriculture on the facts alleged

in this case.[13] He could have thereafter petitioned for intervention in any proceedings initiated pursuant to his application.[14] If indeed the allegedly anticompetitive transfer of membership were in violation of Exchange rules, the Commission could have prevented it.

Moreover, the questions here involved are precisely the ones that the Commission and the Secretary are to resolve in fulfilling their watchdog function over the Exchange and its members.[15] The allowance of a private treble damage antitrust suit in this case prior to the attempted

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[13] Title 17, C.F.R. §§ 0.3 and 0.53 provide that "any interested person having any information of any violation of the act" may file an application requesting the institution of proceedings before the Secretary or the Commission, respectively.

[14] Title 17, C.F.R. §§ 0.8, 0.58.

[15] In *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963), the Court dismissed an antitrust action against defendant carriers who had allegedly agreed not to parallel each other's routes. The Civil Areonautics Board was vested with broad jurisdiction over the air carrier. The Court reasoned at 305:

> "Limitation of routes and divisions of territories and the relation of common carriers to air carriers are basic in this regulatory scheme. The acts charged in this civil suit as antitrust violations are precise ingredients of the Board's authority in granting, qualifying, or denying certificates to air carriers, in modifying, suspending, or revoking them, and in allowing or disallowing affiliations between common carriers and air carriers."

Although the overall regulatory scheme in the instant case is less pervasive than the scheme in *Pan American*, the specific allegations relate directly to the Commission's and the Secretary's power to designate contract markets and allow the trading in futures by individuals. Such power is no less basic to the regulatory scheme than it was in *Pan American*. Also, *compare Far East Conference* v. *United States*, 342 U.S. 570 (1952); *United States Nav. Co.* v. *Cunard S.S. Co.*, 284 U.S. 474 (1932) *with California* v. *F.P.C.*, 369 U.S. 482 (1962); *United States* v. *Borden*

institution of actions before the Commission or the Secretary would discourage "interested persons" from helping the agency fulfill its regulatory function of insuring that contract markets enforce their own rules and bylaws.

Additionally, there is a potential repugnance between a decision of the Commodity Exchange Commission and the award of treble damages in an antitrust action. The 1968 amendments to the Commodity Exchange Act provide the Commission and the Secretary of Agriculture with the discretion to refuse to report "minor violations" of the Act for prosecution "whenever it appears that the public interest does not require such action."[16] The award of damages that are essentially punitive in nature[17] could conflict with a decision by the Commission in the "public interest" that the punitive steps allowable under the Act should not be taken.[18]

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[15] (Continued)
Co., 308 U.S. 188 (1939), for ample illustration of Chief Judge Swygert's observation in *Thill, supra* at 277, that cases on primary jurisdiction provide no clear resolution to the issue.

[16] Title 7, U.S.C.A. § 13c(b) provides:
"§ 13c. • • • minor violations
(b) Nothing in this chapter shall be construed as requiring the Secretary of Agriculture or the commission to report minor violations of this chapter for prosecution, whenever it appears that the public interest does not require such action."

[17] As was said in *Commissioner of Internal Revenue v. Obear-Nester Glass Co.*, 7 Cir., 217 F. 2d 56, 61 (1954), "We might further say that the principal purpose of treble damages seems to be punishment which will deter the violator and others from future illegal acts."

[18] We express no opinion on any antitrust immunity that might result from action or inaction taken by the Commission or the Secretary of Agriculture in this case. The complicated issues of reconciliation of the Commodities Exchange Act and the Sherman Act that would be presented will require the benefit of brief and argument before any determination could be attempted.

We hold, therefore, that before a private treble damage action for antitrust violations may be brought against these defendants charging violation of the rules promulgated as a condition to a contract market designation, the Commodity Exchange Commission and/or the Secretary of Agriculture must have the first opportunity to secure the fulfillment of the statutory duties imposed upon exchanges and their members. The correct remedy in such a case where there is the possibility of a judicial remedy that cannot be granted by the administrative agency is to remand the case to the district court with directions to stay the proceedings until the agency has acted.[19]

Accordingly, we reverse and remand this action to the district court with directions to stay the proceedings until such time as the Commodity Exchange Commission and/or the Secretary of Agriculture may act upon it.

REVERSED AND REMANDED WITH DIRECTIONS

KERNER, *Circuit Judge*, concurring in part and dissenting in part. While I agree that the complaint states a cause of action under the antitrust laws, I do not believe that a remand of this case to the Commission is proper.

Appellant alleges, *inter alia*, that the defendant, Chicago Mercantile Exchange, knowingly conspired with defendant, Siegel Trading Company, to prevent him from continuing as a member of the Exchange and, therefore, from transacting his business. Other allegations in the complaint disclose that incidental to proof of appellant's antitrust claim is the proving of a transference of his membership by the Exchange to James E. Reich. Since this transference allegedly would violate Exchange rules, and thereby the Commodity Exchange Act, if not pursuant to a valid authorization, the majority reasons that Ricci must first proceed before either the Secretary of Agriculture or the Commission.

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[19] *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 222-223 (1966); *Pan American World Airways, Inc.* v. *United States*, *supra* at 313, n. 19.

It may be that Ricci could have proceeded before the Commission. However, it does not follow that Ricci *must* proceed before the Commission. The doctrine of primary jurisdiction does not require courts to stay their hand in all controversies which involve factual disputes arguably within the jurisdiction of an administrative agency. Rather, the doctrine holds "that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over." *Far East Conference* v. *United States*, 342 U.S. 570, 574 (1952). The underlying factual questions in the case at bar involve neither unconventional facts nor administrative discretion.[1] Whether Ricci executed a valid authorization binding on him at the time of transfer is a question which a district court is as competent to assess as a commission composed of the Secretary of Agriculture, the Secretary of Commerce and the Attorney General. And, since Congress has made the enforcement of contract market rules mandatory (7 U.S.C. §7a(9)), no question of administrative discretion could arise.

Thill Securities Corp. v. *New York Stock Exchange*, 433 F. 2d 264 (7th Cir. 1970), *cert. denied* 39 U.S. L.W. 3424, heavily relied upon in the majority opinion, presents a much stronger case for the invocation of primary jurisdiction; yet, two of the judges do not mention the doctrine and the third merely suggests the applicability of the doctrine to the district court.

In *Thill*, a licensed securities dealer brought a class action against the New York Stock Exchange charging an unreasonable restraint of trade and an unlawful monopoly of the securities market in violation of the Sherman Antitrust Act[2] and the Clayton Act.[3] The suit was founded

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[1] The Commission does have discretion to refrain from reporting minor violations of its cease and desist orders for prosecution. See discussion *infra*.

[2] Sherman Antitrust Act §§1-2, 15 U.S.C. §§1-2 (1964).

[3] Clayton Act §4, 15 U.S.C. §15 (1964).

on the Exchange's "anti-rebate rule" which prohibits a member from sharing a commission with a non-member even though the non-member originally received the customer's order. The Exchange contended that the "anti-rebate rule" was within the scope of its authorized self-regulatory powers and that the Securities and Exchange Commission was exercising its statutory power of review which explicitly includes the fixing of reasonable rates of commission.[4] Surely, primary jurisdiction was a more appropriate disposition in *Thill* than it is here. *Thill* was (1) a direct antitrust attack on an Exchange rule (2) which involved unconventional facts and (3) statutorily declared administrative discretion.

In addition, Judge Pell noted in his separate opinion "that the very matter in issue is now under consideration by the S.E.C. which on May 28, 1968, announced investigation and public hearings on rate structure matters including economic access to the Exchange market by non-member broker-dealers." (*Supra,* at 278.) Despite this aspect, Judge Pell would have remanded to the district court those antitrust questions which related to the alleged Exchange practice of favoring certain non-members. (*Supra,* at 278.) While Judge Pell dissented from that part of the majority opinion in *Thill* which remanded plaintiff's direct challenge of the "anti-rebate rule" to the district court, he did not do so on the basis of primary jurisdiction. Rather, he felt that "the 'fixing or reasonable rates of commission . . . and other charges' as provided for by §19(b) (9) of the Securities Exchange Act of 1934 (15 U.S.C. §78(s) (b) (9)) necessarily includes as an ancillary power the prohibition of rebates." (*Supra,* at 277.) This is a decision on the merits of the "anti-rebate rule" and, therefore, not relevant to the question of where litigants must seek their remedy. Hence, neither Judge Campbell nor Judge Pell, a majority of the panel in *Thill,* reached a result consistent

[4] 15 U.S.C. §78(s)(b)(9).

with the result reached by the majority today.[5] In fact, the opinions of Judges Pell and Campbell appear to be clear authority against the majority's disposition of the case at bar.

The criteria enumerated by Chief Judge Swygert in his concurring opinion would dictate a remand to the district court in this case.

(1) The SEC's power to weigh antitrust policy in fulfilling its duty of review of Exchange self-regulation.

I assume the majority opinion intends the Commission (Secretaries of Agriculture and Commerce and the Attorney General) to fully decide the issues in this case. Perhaps the very incongruence of these officials deciding difficult antitrust questions is enough to suggest that Congress did not legislate such a result.[6] However, the resolution of this question need not rest on such grounds. Congress has strictly limited the jurisdiction of the Secretary of Agriculture and the Commission to violations "of the provisions of this chapter." (See e.g., Title 7, U.S.C. §13a.) This chapter means the "Commodity Exchange Act" (Title 7, U.S.C. §1) and not the "Sherman Act," which is found at 15 U.S.C. §1.

Furthermore, there is no provision in the Commodity Exchange Act which suggests that the Commission should

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[5] Evidently, Judge Pell believed the New York Stock Exchange is exempt from suits which are direct challenges to its rules. Since Judge Pell concurred in that part of Judge Campbell's opinion which remanded the remaining issues to the district court, he must have concluded that primary jurisdiction was inappropriate.

[6] I merely observe that antitrust law is not within the peculiar province of the Secretaries of Agriculture and Commerce. Of course, quite the opposite is true of the Attorney General who is the chief enforcement officer of the antitrust laws and who could possibly be placed in an inconsistent position in having to judge those suits.

regulate these types of competitive factors in contract markets. This is in contrast with SEC statutory authority to review "reasonable rates of commission" which arguably includes such factors. Yet Judge Swygert did not believe that this statutorily granted power of review in the SEC meant, *ipso facto*, that the SEC had the power to consider these factors.[7] Instead, Judge Swygert suggested that the district court consider the question. This careful approach by Judge Swygert is not adopted by the majority although Commission authority to consider antitrust law is, at the least, arguable.

(2) The ability of an aggrieved party to initiate SEC review.

It is reasonably clear that appellant could have applied for the institution of proceedings before the Commission and/or the Secretary of Agriculture and thereafter petitioned for intervention. By regulation, intervention is permitted[8] upon a showing of (a) the petitioner's relationship to the matters involved in the proceeding; (b) the nature of the material he intends to present in evidence; (c) the nature of the argument he intends to make; and (d) any other reason he should be allowed to intervene.

These factors indicate that both the Commission and the Secretary of Agriculture possess the power to exclude claimants based on the nature of their claims. Since institution of proceedings is permitted only when there is reason to believe there has been a violation,[9] Ricci might be

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[7] "Cases concerning primary jurisdiction of other administrative agencies to consider antitrust matters do not provide clear guidance for resolution of this question. Compare, *Pan American World Airlines, Inc.* v. *United States,* 371 U.S. 296, 83 S. Ct. 476, 9 L. Ed. 2d 325 (1963); *California* v. *F.P.C.,* 369 U.S. 482, 82 S. Ct. 901, 8 L. Ed. 2d 54 (1962)." (Concurring opinion of Chief Judge Swygert at p. 277.)

[8] Title 17, C.F.R. §0.8, 0.58.

[9] Title 17, C.F.R. §0.3, 0.53. Thus, Ricci may be limited to proof of a Rules violation.

prevented from asserting his antitrust action before the Commission. Ricci would then return to the district court on his antitrust claim, needlessly multiplying the number of tribunals involved in these proceedings. Of course, this question could be answered, as it was in *Thill*, by a remand to the district court for the taking of evidence.

(3) The extent that SEC expertise would be useful in resolving the question of whether the anti-rebate rule was necessary to make the Securities Exchange Act work.[10]

Seemingly, the relevance of this factor is extremely limited in this case. Ricci has alleged and must prove facts which show an unlawful conspiracy between the Exchange and Siegel Trading Company. A good faith but erroneous decision by the Exchange would not be a violation of the Sherman Act. The power to decide membership requirements implies the power to make good faith but erroneous decisions. Such power is needed to make the Exchange Act Work. *Silver* v. *N.Y.S.E.*, 373 U.S. 341, 357. Since Ricci did not allege that a good faith decision by the Exchange to transfer his membership was a violation of the antitrust laws, the question under (3) is whether it is necessary to make the Act work for the Exchange to possess power to determine its membership if these determinations are motivated by otherwise unlawful intent. This is traditional "rule of reason" inquiry which the Court in *Silver* described as "flexible enough to permit the Exchange sufficient breathing space. . . ." (*Supra* at 360.) Whether the Exchange should be insulated from this type of antitrust liability will be considered in the following section. All that remains to be mentioned here is that a district court would have greater expertise and experience in this regard than the Commission. Judge Campbell so held in *Thill*:

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[10] This assumes that the Secretary and/or the Commission have the power to consider antitrust claims. Since the question of primary jurisdiction was neither briefed nor argued orally, we are somewhat inhibited in our analysis.

> It is in this area of public protection that the SEC claim their expertise. On the other hand, it should be remembered that the courts of the United States have over the years become the repository of antitrust expertise. (433 F. 2d at 273.)

Whatever the validity of this holding with regard to the "anti-rebate rule," it is doubtless true here where the technical complexities do not approach those present in *Thill*.

(4) The possibility of achieving the aims of the Sherman Act without subjecting exchanges to treble damage suits.

I would think that the aims of the Sherman Act could only be achieved by enforcing that Act against Exchanges which make unlawful transfers of membership for anti-competitive reasons. Perhaps the nature of the action in *Thill* presents a more difficult question; however, I am able to think of no legitimate public policy goals which are advanced by insulating this Exchange from antitrust liability given the conduct alleged in the complaint. The majority opinion indicates none. Yet, the opinion intimates that because of a "potential repugnance between a decision of the Commodity Exchange Commission and the award of treble damages in an antitrust action" (*infra* at p. 11), the aims of the Sherman Act should be subordinated to the aims of the Commodity Exchange Act. This "potential repugnance" stems from Commission discretion to refuse to report minor violations of its cease and desist orders.[11] Apparently the majority would permit the Commission, which does not have jurisdiction to consider the question of damages, to foreclose private suits if such foreclosure were deemed in the public interest.

This reconciliation of the Commodities Exchange Act and the Sherman Act is not consistent with prior Supreme Court decisions on the subject. *United States* v. *Philadel-*

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[11] 7 U.S.C. §13(b).

phia National Bank, 374 U.S. 321, 351 (1963); *United States* v. *Borden*, 308 U.S. 188, 198-200 (1939). Significantly, there is no statutory standard or detailed economic regulation to guide the Commission in making its "public interest" determination. *United States* v. *Philadelphia National Bank, supra; California* v. *Federal Power Com'n*, 369 U.S. 482, 484-85, 487-88 (1962). In fact, there is no suggestion that the Commission has ever considered, or desires to consider, the economic impact of its decisions. This is not true either of the FPC or the Comptroller of the Currency. *United States* v. *Philadelphia National Bank, supra; California* v. *Federal Power Com'n, supra.* Yet, these bodies do not possess the kind of power the majority would confer on the Commodity Exchange Commission.

Moreover, there is no "potential repugnance" between the Commodity Exchange Act and the Sherman Act. All Congress has done by granting the Commission the aforementioned discretion is to allow the Commission the traditional freedom available to any public prosecutor. It is a cardinal principal of legislative interpretation to construe away from inconsistencies. Here such a construction is not only unstrained, but also the natural meaning to be given the words used. Faced with this situation, a court should not create inconsistencies and then purport to reconcile them.

For the foregoing reasons, I believe the proper disposition of this case is a remand to the district for further proceedings.

For the Seventh Circuit
Chicago, Illinois 60604
TUESDAY, OCTOBER 5, 1971
Before

Hon. LUTHER M. SWYGERT, *Chief Judge*
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. THOMAS E. FAIRCHILD, *Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. OTTO KERNER, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. JOHN PAUL STEVENS, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*

THOMAS RICCI,
Plaintiff-Appellant,
No. 18222
v.
CHICAGO MERCANTILE EXCHANGE, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

On consideration of the petition for rehearing and suggestion that it be heard *en banc* filed in the above-entitled cause, and the answers of opposing counsel in response thereto, a vote of the active members of the court was requested, and all members of the panel having voted to deny a petition for rehearing, and a majority of the active members having voted to deny a rehearing *en banc,*

IT IS ORDERED that the petition for rehearing and the petition for rehearing *en banc* be, and the same are hereby denied.

Judge Stevens voted to grant the petition for rehearing *en banc.*